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IN THE

Supreme Court of the United States

October Term, 1961

No. 543

MICHAEL MONICA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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To the Supreme Court of the United States:

JURISDICTIONAL STATEMENT WITH REFERENCE TO OPINIONS BELOW

MICHAEL MONICA, the petitioner herein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated and entered on the 23rd day of October 1961. The opinion rendered by said Court of Appeals is not yet officially reported, — F. 2d — however the slip opinion is annexed hereto as the appendix.

The aforementioned judgment affirmed a judgment of conviction of the United States District Court for the East-

ern District of New York dated the 16th day of December 1960 which based upon the verdict of a jury adjudged the petitioner guilty of the crime of conspiracy to violate the Narcotics Laws of the United States, Title 21 U.S.C. Sec. 174, and sentenced him to a term of eight years imprisonment. No opinion was rendered by said District Court.

No petition for a rehearing has been made to the United States Court of Appeals for the Second Circuit, nor has any application been made for an extension of time within which to petition for certiorari.

Jurisdiction is conferred on the Supreme Court of the United States to review the aforementioned judgment of the United States Court of Appeals for the Second Circuit by writ of certiorari under Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where the total evidence against the petitioner was directed to three separate episodes wherein the petitioner was seen in the company of other co-conspirators and where each of these episodes by itself was an insufficient basis upon which to bottom a conviction for the crime charged, conspiracy to violate Title 21 U.S.C. Sec. 174, could the total aggregate of these episodes constitute evidence sufficient to convict when independently each episode merely showed nothing more than suspicious circumstances?

2. Upon the evidence presented on the trial was the failure of the Government to show actual possession of a narcotic drug in the petitioner or his knowledge that it was imported contrary to law, fatal to the prosecution for con-

spiracy to violate the Narcotics Laws of the United States under Title 21 U.S.C. Sec. 174 and Title 18 U.S.C. Sec. 2?

3. With regard to the doctrine of constructive possession where there is a conflict between the Courts of Appeal of the Second and Seventh Circuits (See *United States* v. *Landry*, 257 F. 2d 425, wherein the Seventh Circuit refuses to apply the doctrine of constructive possession) does the doctrine of constructive possession as applied by the Second Circuit to the statutory presumption contained in Title 21 of the United States Code, Sec. 174 constitute an unconstitutional usurpation by the Court of legislative power?

4. Upon the evidence presented on the trial, was the failure of the Government to show actual possession or control of a narcotic drug in the petitioner or his knowledge that it was imported contrary to law fatal to the prosecution of petitioner for conspiracy to violate the Narcotics Laws of the United States under Title 21 U.S.C. Sec. 174 and Title 18 U.S.C. Sec. 2, under the rule as stated by the Second Circuit in *United States* v. *Hernandez*, 290 F. 2d 86 wherein the majority opinion stated that mere possession of a narcotic drug by another defendant in and of itself and in the absence of knowledge of its illegal importation by a conspirator, facilitator, or aider and abettor is insufficient to bring the aforesaid statutory presumption into operation against said conspirator, facilitator or aider and abettor?

5. Does the conflict within the Second Circuit with regard to the elements of proof necessary to bring into operation the statutory presumption arising from possession

under Title 21 U.S.C. Sec. 174, deprive the petitioner of his liberty without due process of law?

C. Did the petitioner waive his right to raise on appeal matters of law not covered in the Court's charge when no exception was taken to the Court's charge as such, but where petitioner made certain requests to charge as to said matters not covered by the Court in its charge, which requests were refused and to which refusals exception was duly taken and where the controlling law applicable was later enunciated by the Second Circuit in a decision rendered at a date subsequent to the entry of judgment?

CONSTITUTIONAL AND STATUTORY PROVISIONS IN POINT

CONSTITUTION OF THE UNITED STATES.

AMENDMENT V

"No person shall be • • •; nor shall any person be • • • deprived of life, liberty, or property, without due process of law; • • •."

UNITED STATES CODE, TITLE 18.

"§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. • • •"

UNITED STATES CODE, TITLE 21.

"§ 174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *

* * * Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. * * *"

UNITED STATES CODE, TITLE 26.

"§ 4724. Unlawful acts in case of failure to register and pay special tax.

* * *

(c) Possession.—It shall be unlawful for any person who has not registered and paid the special tax provided for by this subpart or section 4702(a) to have in his possession or under his control narcotic drugs; and such possession or control shall be presumptive evidence of a violation of this subsection and subsection (a), * * *."

CONCISE STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the Eastern District of New York was originally invoked because the crime charged, conspiracy to violate the Narcotics Laws of the United States, Title 24 U.S.C. Section 174, arose under the laws of the United States and certain acts committed in violation of said statute were alleged to have occurred within the Eastern District of New York.

The petitioner was tried alone on the sole count of the indictment naming him a party defendant, the conspiracy count (Count XVII) of a seventeen count indictment which named nine other persons as parties defendants.

On the trial the Government based its case against the petitioner upon the testimony of five U. S. Narcotics Agents, to wit: Charles R. McDonnell, John Brady, Frank Selvaggi, Arthur J. Mendelsohn and Ivan Wurms, and of a New York City detective, one Adolph Villafana.

The petitioner did not call any witnesses but based his case upon the Government's failure of proof (R. 150-153, 14a-16a).*

The events as testified to at the trial centered around four alleged transactions:

1. The alleged sale of March 31, 1959 (R. 14) evidenced by Government's Exhibits 6a, 6b and 6c (R. 31-35);

2. The alleged delivery of narcotics of April 5, 1959 (R. 71-75) as evidenced by Government's Exhibit 15 in evidence (R. 104-105);

* Numerals in parenthesis preceded by letter "R" refer to page numerals of the Record on Appeal to the Court of Appeals. numerals followed by letter "a" refer to page numerals of the Appendix to Petitioner's Brief in the Court of Appeals.

3. The alleged sale on April 9, 1959 (R. 17-20), and;

4. The alleged delivery of narcotics on May 7, 1959 (R. 24-29) as evidenced by Government's Exhibit 7 in evidence (R. 35-38).

In addition testimony was offered showing a trip that a codefendant, Joseph Valachi, made from the Bronx to Queens on the night of April 3rd, 1959 (R. 131-134).

An analysis of the evidence shows that the petitioner Michael Monica was not a party to any of these transactions nor was he shown to be connected with the conspiracy as a whole.

The March 31st Transaction

This transaction, culminating in the alleged sale of 136.35 grams of heroin (R. 34) to U. S. Narcotics Agent Charles R. McDonnell centered around Agent McDonnell, Informer Richard Woodruff and John Freeman, who although named as a party defendant in the indictment was not tried with the petitioner.

The testimony concerning this alleged transaction was as follows:

Agent McDonnell testified that on March 22, 1959, while working as an undercover agent, he met John Freeman at the Palm Florist Shop located in Brooklyn and ordered five ounces of pure from Freeman, agreeing to pay $280.00 (R. 5).

McDonnell further testified that he was again in the vicinity of the Palm Florist Shop with Informer Richard Woodruff at 10:00 a. m. on March 30th and that he left

Woodruff off at the Palm Florist Shop. U. S. Narcotics Agent Arthur J. Mendelsohn testified that on the same day at 3:00 p. m. while maintaining a surveillance in the vicinity of the Palm Florist Shop he saw Frederick Horton (also named as a defendant but not tried with the petitioner), that Horton drove up, spoke to John Freeman at the Palm Florist Shop and then drove off ten minutes later (R. 106) driving to Manhattan to the vicinity of 119th Street and Lenox Avenue, where he entered the Acqua Lounge, and where he remained the greater part of the afternoon.

U. S. Narcotics Agent Ivan Wurms testified that at 5:40 p. m. of the same day he was maintaining a surveillance of 45 Shawnee Avenue, Yonkers and that he saw Ralph Wagner (named as a defendant but not tried with the petitioner) leave said premises and drive to a restaurant on Central Park Avenue where he met Herbert Sperling (named as a defendant, but not tried with the petitioner) and that Wagner and Sperling then drove towards Manhattan where they were lost in traffic (R. 118).

U. S. Narcotics Agent John Brady testified that at 4:30 p. m. that same day (March 30th) he was in the Bronx in the vicinity of 1005 Esplanade Avenue (R. 38) and that at 8:15 p. m. he saw the petitioner leave the house, enter a car and remain in the car till about 9:00 p. m. when he emerged and re-entered the house (R. 40) and that 15 minutes later Brady saw Joseph Valachi (named as a defendant but not tried with the petitioner) drive up, enter the house, emerge shortly thereafter with the petitioner, and the petitioner then drove off alone (R. 42).

In the meantime and at about 7:30 that afternoon, Agent McDonnell in Brooklyn remained at the apartment of Rich-

ard Woodruff at 441 Franklin Avenue, Brooklyn, where he remained until 4:40 the next morning (March 31st) (R. 8).

Agent Mendelsohn testified that on March 30th at 8:55 p. m. he observed Frederick Horton leave the Acqua Lounge in Manhattan and then drove a short distance to a Florist shop in that area and speak to John Freeman (R. 107). Mendelsohn further testified that at 9:30 p. m. he observed defendants Wagner and Sperling enter the florist shop, speak to Freeman and that shortly thereafter, Sperling drove off in a car, driving to the vicinity of Webster Avenue and Gun Hill Road, in the Bronx, where he parked the car (R. 108).

U. S. Narcotics Agent Frank Selvaggi testified that at 10:20 that night (March 30th) while he was in the vicinity of 1005 Esplanade Avenue, Bronx, he saw the petitioner drive up and enter the building (R. 60) and the other agents who were in the area, to wit: Wurms and Brady testified that they saw the petitioner drive off about 10:50 p. m. (R. 44, R. 120).

Mendelsohn further testified that at 12:30 a. m. on March 31st while maintaining a surveillance upon the car that Herbert Sperling had parked earlier that night in the vicinity of Gun Hill Road and Webster Avenue, Bronx, he observed John Freeman drive up in a car and leave Frederick Horton out and that Horton then entered the Bronx River Bar & Grill, which was located in the vicinity (R. 109).

Agent Brady testified that at 1:15 a. m. on March 31st, he was in the vicinity of 1005 Esplanade Avenue and saw the petitioner return to the building, enter it, then emerge and drive off at 1:30 a. m. (R. 45). See also testimony of Agent Wurms (R. 121).

Agent Wurms testified that at 1:15 a. m. (March 31st) he went to the court yard of 1005 Esplanade Avenue, looked in a window and through partly closed venetian blinds (R. 140) saw Joseph Valachi hand the petitioner a small brown paper bag which he testified the petitioner put in his shirt pocket before leaving the apartment (R. 122). *Wurms admitted that the petitioner was never searched or questioned with regard to this package and that he never tried to find out what was in the package* (R. 142). Wurms further testified that he followed the petitioner from 1005 Esplanade Avenue to the vicinity of the Maple Bar which is near Gun Hill Road and White Plains Avenue, Bronx and that the petitioner then parked his car and entered the bar (R. 125). *Agent Wurms testified that the petitioner resided around the corner from the Maple Bar and Grill* (R. 143).

Agent Brady testified that at 1:40 a. m. on March 31st he was in the vicinity of the Maple Bar & Grill and that he saw the petitioner drive up, park and enter the Maple Bar (R. 47). Agent Brady further testified that at 2:00 a. m. he observed Ralph Wagner, Herbert Sperling and petitioner in the bar (R. 49).

Agent Mendelsohn testified that at about 2:30 a. m. (March 31st) he saw Herbert Sperling who was walking alone on Gunhill Road go to the car that he parked earlier that night, open the door, place something in the car, then walk past the Bronx Bar & Grill (R. 109) and that shortly thereafter he observed Frederick Horton leave the bar, enter the car that Sperling had parked earlier and drive to 441 Franklin Avenue, Brooklyn, enter the apartment house and leave shortly thereafter (R. 110).

Meanwhile in Brooklyn at 1:50 that morning (March 31st) Agent McDonnell testified that he and Richard Woodruff were at Woodruff's apartment at 441 Franklin Avenue, where they remained except for a short period of time when Agent McDonnell and Woodruff left the apartment and Woodruff went off with John Freeman (R. 9). Agent McDonnell testified that he and Woodruff were back in the apartment at 3:15 a. m., that Woodruff left the apartment again and he saw him speak to John Freeman in the street (R. 10), that at 3:30 a. m. Woodruff received a phone call, that at 4:00 a. m. Horton came to the apartment and gave Woodruff a package containing five glassine envelopes, and that he, Agent McDonnell, in Horton's presence, gave Woodruff $2800. (R. 14). The glassine envelopes and their contents were identified as 136.35 grams of heroin and they were admitted in evidence as Government's Exhibits 6a, 6b and 6c (R. 33-35).

Agent Brady testified that at 4:10 a. m. he was in the vicinity of 441 Franklin Avenue, Brooklyn, and that he saw Frederick Horton enter the building at about that time (R. 53). Agent Selvaggi, who was also in the vicinity gave similar testimony and in addition, he testified that soon after he observed Horton leave the building followed by Agent McDonnell (R. 65). Agent Selvaggi further testified that he then walked to the area of the Palm Florist Shop and observed John Freeman in an automobile parked in front of the florist shop; that Woodruff went over and spoke to Freeman and then left (R. 65) and shortly thereafter, defendants Joseph Valachi and Ralph Wagner joined Freeman, spoke to him about five minutes and then drove off (R. 67). See also testimony of Agent Mendelsohn (R. 110-111) and Agent Wurms (R. 128 to 129).

Event of April 3rd

Agent Wurms testified that at around 9:30 p. m. on April 3, 1959 he was in the vicinity of 1005 Esplanade Avenue, in the Bronx, that he observed Joseph Valachi enter the building and that afterwards he peeked through a window and saw an apartment in which a young woman was vacuuming the floor; that Valachi entered and took a box that looked like a candy box, carried it out to his car and then returned to the apariment (R. 130). Wurms further testified that at 11:30 p. m. he observed Valachi and the woman drive to premises 18902 Williamson Avenue, Queens, which was identified as John Freeman's residence; that Valachi left the young woman in the car and entered the house where he remained for a half hour and that on emerging Valachi and the woman returned to Esplanade Avenue where Valachi remained until 3:30 the next morning, when he left for his home (R. 134).

The Seizure of Narcotics on April 5th

The evidence leading up to the above seizure of narcotics is as follows:

Agent Selvaggi testified, that on April 4th, he together with other Narcotics Agents and the New York City Police were maintaining a surveillance on the Esquire Florist Shop located at 118th Street and Eighth Avenue, Manhattan and that at 10:00 p. m. he observed Frederick Horton enter the florist shop and join John Freeman, who was inside, that after a short while Horton left (R. 69) and was followed to the vicinity of Webster Avenue and Gun Hill Road in the Bronx, where he parked his car and then entered the Bronx River Bar located nearby (R. 69). See

also testimony of Detective Adolph Villafana of the New York City Police (R. 93, 94). Selvaggi further testified, that at 11:00 p. m. he saw the petitioner together with the defendant Ralph Wagner drive past the area in a car (R. 70). See also testimony of Detective Villafana (R. 95); Selvaggi testified that at 12:30 a. m. on April 5th while he was still in the area of the Bronx River Bar he saw the car driven by the petitioner in which Ralph Wagner was a passenger stop and Wagner got out, walked over to the car that Horton had parked earlier, opened the door, placed a brown paper bag in the car, closed the door and then entered the Bronx River Tavern. During this time, as Agent Selvaggi testified, the petitioner who had stopped momentarily was no longer in the area (R. 71). See also testimony of Detective Villafana (R. 95).

Selvaggi further testified that at about 1:30 a. m. that morning, he saw Frederick Horton leave the Bronx River Bar, enter his car, drive off, that soon thereafter Horton was stopped and arrested by New York City Police at Bainbridge Avenue near its intersection with 207th Street in the Bronx (R. 72, 73) and that at the time of his arrest, a bag containing 25 packages of a white powder was taken from him by the New York City Police Officers (R. 75).

Detective Villafana of the New York City Police testified that he was the police officer who placed Horton under arrest and that at the time that he arrested Horton, he took from him a package and envelopes which contained a powder identified as heroin (R. 103). The packages and their contents were admitted in evidence as Government's Exhibit 15 (R. 103-105).

The Sale of April 9th

The above transaction occurred solely in the Borough of Brooklyn and centered around Agent McDonnell, informer Woodruff and John Freeman.

Agent McDonnell testified that on April 9th he had a conversation with John Freeman at the Palm Florist Shop in Brooklyn, that Freeman agreed to sell him three ounces of heroin and that at the time he paid $900. in cash with the balance to be paid later (R. 16). McDonnell further testified that after his conversation with Freeman, he went to the home of Richard Woodruff at 441 Franklin Avenue, Brooklyn, where after making a phone call, Woodruff gave him three glassine envelopes containing a white powder (R. 18). The contents of these envelopes, which were marked as Government's Exhibits 16a, 16b and 16c, were identified as heroin (R. 113, 114). McDonnell testified that on April 14th, he paid Freeman the sum of $350. as part payment for the April 9th purchase (R. 21) and that on April 16th he paid Freeman the balance of $400. which was still owing on this purchase (R. 21).

The Delivery on May 7th

The above delivery took place on the final day of the conspiracy alleged in the indictment.

Agent McDonnell testified that on May 3, 1959 he made a telephone call from Washington, D. C. to John Freeman in Brooklyn, that he inquired from Freeman as to the price of several kilos of heroin and that Freeman told him that he had two packages for sale, a $14,000. package and a $12,000. package (R. 22-23). McDonnell further testified that on his return to New York he tele-

phoned Freeman in the morning of May 5th (R. 23); that the next day, May 6th, he saw Freeman, at which time he told him that he wanted to purchase twenty ounces of "cut stuff" and that he and Freeman agreed upon a price of $9990 (R. 24). McDonnell further testified that at 7:30 p.m. (May 6th) Freeman telephoned him at home and after verifying that the deal was still on, told him that delivery was scheduled for tomorrow night (May 7th) (R. 24).

Agent Selvaggi testified that at 7:55 p.m. (May 6th) he was in the vicinity of Eastchester Road and Fisher Avenue, Bronx, and that he observed petitioner and the defendant Valachi emerge from a theater in the vicinity (R. 76) and that he overheard the following conversation between them (R. 77-78):

> "Q. Is this a conversation that took place between this defendant Monica and Joseph Vallacci? A. That's correct.
>
> Q. Now, what did you hear them say? A. The part of the conversation I heard was that Vallacci said, 'John's customer in Brooklyn is taking a half' and the defendant Michael Monica said, 'A half' and said 'All right' and Vallacci said, 'Get a half and a quarter, too,' and the defendant said, 'A half and a quarter—okay,' and Vallacci said to Monica, 'Be careful' and that was it. They departed. Vallacci entered his car and drove off and defendant Michael Monica was followed and observed to enter a 1959 black Ford, but due to the fact my other agent could not get the plate number of the vehicle because we were not near enough."

Agent McDonnell testified that he spoke to John Freeman by telephone several times during the day on May 7th and that at 8:30 that evening Freeman told him by phone to be ready for delivery of a package and that he was sending his runner John Love Freeman over to McDonnell's home, which was in Brooklyn (R. 24); that shortly thereafter McDonnell went downstairs where he saw a car double-parked and saw John Love Freeman and Georgie Fludd (both of whom were named defendants but were not tried with the petitioner); that John Love Freeman and Georgie Fludd left the car and as they were entering the lobby of McDonnell's apartment, Georgie Fludd gave McDonnell a hat box that she was carrying, whereupon both John Love Freeman and Georgie Fludd were placed under arrest (R. 27). McDonnell testified that the hat box given to him by Georgie Fludd contained 120 glassine envelopes containing a white powder and that the total weight of same was 121 oz. (R. 28) and which was identified as heroin. The container and powder were admitted in evidence as Government's Exhibit 7 (R. 37-38).

Motions at the End of the Government's Case and Again Renewed at the Conclusion of the Trial

At the conclusion of the Government's case, counsel for the petitioner moved for judgment of acquittal on the grounds that the Government failed to prove a *prima facie* case (R. 150, 14a) and also to strike from the record testimony of the witnesses, McDonnell and Mendelsohn (R. 151, 15a). These motions were denied (R. 153), 16a).

Immediately thereafter the defense rested without calling any witnesses and renewed the motions previously made at the conclusion of the Government's case. These motions were again denied and the defendant excepted (R. 153, 16a).

Petitioner's Requests to Charge at Close of Trial

Prior to the Court charging the jury, counsel submitted certain requests to charge on behalf of the petitioner (R. 191, R. 198). The Court refused to grant certain of these requests to charge and exception was duly taken from the Court's refusal to so charge (R. 168, 27a, R. 170, 29a). Three of the petitioner's requests to charge which the Court refused were:

Request "Seven" dealing with the requirements of proof as to the one over-all conspiracy as set forth in the indictment as distinguished from small unrelated conspiracies or substantive acts (R. 172, 29a);

Request "Eight" setting forth the requirement of proof that petitioner have knowledge that the narcotics were imported contrary to law before he could be convicted of a violation of Title 21 U.S.C. §174 (R. 173, 29a, 30a) and;

Request "Twelve" which was directed to the simple isolated transaction theory stating that a single isolated transaction is an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy (R. 174, 30a).

Verdict and Sentence

The jury subsequently found the petitioner guilty as charged in Count XVII of the indictment and the Court

sentenced him to a term of imprisonment for a period of 8 years (R. 179, 30a, R. 199, 31a, 32a).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

POINT I

The evidence on the trial against the petitioner consisted at most of suspicious circumstances which could not be pyramided to the dignity of evidence sufficient to convict. (Question 1)

The United States Court of Appeals for the Second Circuit in its decision affirming the conviction of the petitioner, while recognizing the fact that the petitioner's connection with incidents involving co-defendants in and of themselves might have been without guilt or casualty, construed the total sum of said suspicious incidents as raising themselves by their boot straps to the dignity of evidence sufficient to convict. See *United States* v. *Monica*, — F. 2nd —, see slip opinion annexed as appendix, page 37.

In the present case there was neither a showing of commission of any substantive acts relating to narcotics nor agency in said crime by the petitioner. Likewise there were no statements charged to the alleged principal Joseph Valachi acknowledging said agency in crime in the petitioner nor were there any admissions or statements by the petitioner acknowledging that he dealt in narcotics. Also there was no evidence on the trial concerning illegal importation of narcotics or knowledge of the petitioner of such illegal importation—essential elements of the crime charged.

The only testimony concerning a conversation between the petitioner and any of the other named defendants, is the alleged overheard conversation with the defendant Valachi (R. 77) which is alleged verbatim on pages 15 and 16 of this petition.

An analysis of this conversation with regard to the natural sequence of events shows no possible relationship to either the other evidence given in this case or the conspiracy alleged in the indictment. Agent McDonnell testified that on the morning of May 6, 1959 he saw the defendant John Freeman and at that time ordered twenty ounces of "cut stuff" for the price of $9000 (R. 23, 24). In chronological order the alleged conversation between the petitioner and Valachi took place that night (R. 75-76) and the next night after 8:40 p. m. (R. 24) the defendants, John Love Freeman and Georgie Fludd were arrested in Brooklyn together with 121 oz. of heroin which they were allegedly delivering to Agent McDonnell (R. 28). The date that John Love Freeman and Georgie Fludd were arrested (May 7th, 1959) is the final date of the conspiracy as alleged in the indictment.

Certainly a reading of the alleged conversation between the petitioner and Joseph Valachi discloses no reference to narcotics and any assumption that narcotics were being referred to would be baseless in view of the fact that weights or terms used in said conversation did not have any correspondence with the twenty ounces of "cut stuff" allegedly ordered by Agent McDonnell from John Freeman on May 6th (R. 23, 24) or with the 121 oz. (10 lbs.) of heroin delivered by the defendants John Love Freeman and Georgie Fludd the night of May 7th in Brooklyn (R. 28).

Certainly if the Court was inclined to indulge in presumptions and presumed that the terms, "a half" and "a quarter" referred to the term kilos, the Court should then take judicial notice of the fact that a kilo or kilogram equals 2.205 lbs. or 1000 grams and that 12 oz. (apothecaries) which measure is used in weighing drugs equals 1 lb. (see Encyclopedia Britannica, Vol. 15, Measures and Weights, pages 135-141). Therefore the term "a half" would refer to approximately 1.1 lbs. or slightly over 12 oz. (apothecaries) or 16 oz. (avoirdupois) which measure is used in weighing articles other than drugs or precious stones and the term "a quarter" would refer to approximately ½ lb. which equals 6 oz. (apothecaries) or 8 oz. (avoirdupois). It is thus self-apparent that using either measure, the weights of the unidentified product referred to in the aforementioned conversation did not coincide wiht the other testimony as to weights in the case, therefore leaving no possible room for any inferences of guilt based on said evidence.

It was this alleged conversation of May 6th which was relied upon by the Government in its brief to connect the petitioner with the alleged conspiracy. (See Government's brief to the Court of Appeals, pages 8, 13 and 14.)

The Court of Appeals while recognizing the fact that no reference was made by the parties to narcotics in the alleged May 6th conversation and further recognizing the discrepancy of quantities mentioned in the alleged conversation with all other testimony concerning quantities in the case, construed the two other aforementioned incidents as creating by innuendo a meaning in the alleged May 6th conversation, which does not appear from its language.

See *United States* v. *Monica*, — F. 2d —, see slip opinion annexed as appendix, pages 37 and 38, also footnote 1 of said opinion.

It is Hornbook Law that circumstances which merely raise suspicion or give room for conjecture cannot serve as a basis to convict. See *Kassin* v. *United States*, 87 F. 2d 183 (C.C.A. Fifth, 1937).

In *Aikens* v. *United States*, 232 F. 2d 66 (U.S.C.A. Dist. of Col. 1955) which involved a prosecution for conspiracy and operation of a lottery and possession of lottery tickets in the District of Columbia, regular attendance of the appellant at the premises which were shown to be gambling premises in itself was not held sufficient evidence to warrant a conviction.

In *McClain* v. *United States*, 224 F. 2d 522, 525 (U.S.C.A. Fifth 1955) which involved a prosecution for possession of non-tax paid alcohol, a conviction was set aside on the grounds that presence of the appellant on the premises where the crime was being committed together with knowledge of the commission of said crime were mere suspicious circumstances which in and of themselves were not sufficient evidence to prove guilt.

Certainly in the present case, where the circumstances of the petitioner's presence near the Maple Bar were explained by the fact that he resided in the immediate vicinity (R. 143) there obviously was no evidence sufficient to warrant a conviction.

It is respectfully submitted that both the conviction of the petitioner in the District Court and the affirmance of his conviction in the United States Court of Appeals were not warranted by the evidence but resulted from confusion

created by the present status of the law applicable to the construction of the statutory presumption as set forth in Title 21 U.S.C. Section 174 and which confusion as to the present status of the law resulted in a denial of due process of law to the petitioner in violation of his constitutional rights.

POINT II

The Supreme Court should grant certiorari in order to allay the general confusion with regard to the interpretation of the statutory presumption arising from possession of narcotics as set forth in Title 21 U.S.C., Section 174. (Questions 2, 3, 4 and 5)

This Point is intended to cover all of the questions arising out of the interpretation of the statutory presumption contained in Title 21 U.S.C. Section 174.

The present status of the law regarding the interpretation of the statutory presumption set forth in Title 21 U.S.C. Section 174, is confused, to say the least. This statutory presumption reads as follows:

> "• • • Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. • • •"

The aforementioned statutory language is given a literal construction by the Seventh Circuit—see *United States* v. *Landry*, 257 F. 2d 425, wherein said Circuit construes the term "possession" to apply to actual physical possession

and not to either ownership or control over the narcotic which is deemed constructive possession by the Second Circuit so as to bring the above statutory presumption into operation.

In *United States* v. *Santore*, 290 F. 2d 51 (see *in Banc* decision, 290 F. 2d 74), cert. denied sub nom. *D'Aria* v. *United States*, 365 U. S. 834, 5 L. Ed. 2d 743, *LoPiccolo* v. *United States*, 365 U. S. 834, 5 L. Ed 2d 743 and *Santore* v. *United States*, 365 U. S. 834, 5 L. Ed. 2d 744, which involved the crimes of conspiracy and substantive violations of Title 21 U.S.C. Section 174, the doctrine of constructive possession was invoked by the Second Circuit with regard to the Appellants D'Aria and Massi whom although they were never shown to have been in actual possession of certain identified narcotics, were found by the evidence to have exercised proprietary control over said narcotics. The late Senior Circuit Judge Learned Hand, however, in his dissenting opinion (Page 70) wherein he found no possession in Appellants D'Aria and Massi, stated that he understood the term "possession" as used in the aforementioned statute to mean either actual custody of the chattel or at least that relationship by the defendant to the custodian that makes the custodian unconditionally subject to the defendants demand for custody. Any further extension of this doctrine in Judge Hand's opinion, was not sufficient to bring the statutory presumption into play. Judge Hand further stated that if Congress had intended to include the elements defined by the Court as constituting constructive possession within the statutory presumption that it had created, in Title 21 U.S.C. Section 174, it would have used clear language to that effect. In support of his argument, Judge

Hand cited Title 26 U.S.C. Section 4724 which uses the following language:

> "(c) Possession.—It shall be unlawful for any person who has not registered and paid the special tax provided for by this subpart or section 4702(a) to have in his possession *or under his control* narcotic drugs; and such possession *or control* shall be presumptive evidence of a violation of this subsection and subsection (a) * * * (Emphasis supplied).

It was Judge Hand's opinion that if Congress had desired to make the statutory presumption contained in Title 21, U.S.C. Section 174, applicable to constructive possession, it would have used language to that effect and more particularly language similar to that contained in Title 26, U.S.C. Section 4724.

After the Second Circuit rendered its decision in *Santore*, *supra*, it granted a rehearing *in Banc* for a reconsideration by all of the active judges of said Circuit of the questions raised on the aforementioned appeal and especially with regard to the interpretation of the term "possession" as used in Title 21 U.S.C. Sec. 174, believing that serious questions had been raised with regard to the administration of the federal narcotics laws. In its decision *in Banc* cited *United States* v. *Santore*, 290 F. 2d 74, in the prevailing opinion written by Chief Judge Lumbard the convictions of the Appellants Santore and LoPiccolo on Count 2 of the indictment were affirmed. These convictions had previously been reversed by the panel originally deciding the case on the grounds that LoPiccolo, although a conspirator, was not shown to have had either possession or control of the narcotics sold on December 11, 1951 as charged in Count 2 nor was there any evidence that he knew that said

narcotics were imported contrary to law, while Santore, who functioned only as an intermediary between the purchasers and sellers and had no voice in the decision in deciding what was to be done with the narcotics, likewise was not shown to have had possession or knowledge of the illegal importation of said narcotics. On the rehearing *in Banc* however the aforementioned convictions of Santore and LoPiccolo under Count 2 of the indictment were affirmed by an equally divided bench. Chief Judge Lumbard writing for himself and Judges Moore and Smith found LoPiccolo to have been a principal conspirator having control over the arrangements for the sale and how delivery should be made and therefore held him chargeable with the possession by his co-conspirators. With regard to Santore, Chief Judge Lumbard, although finding him not to be a principal conspirator similar in status to LoPiccolo, characterized him as an aider and abettor, as defined by Title 18 U.S.C. Section 2, and held that because Santore aided and abetted the principals in the sale of narcotics which he knew that they possessed, he likewise was chargeable with the possession of his principals under the doctrine of constructive possession.

Judge Waterman with whom Judge Clark concurred stated in his dissenting opinion that the conviction of the Appellants Santore and LoPiccolo on Count 2 should be reversed, holding that Title 21 U.S.C. Sec. 174 and Title 18 U.S.C. Sec. 2 were mutually exclusive and could not supplement each other and that in the absence of personal possession, of Narcotics, whether physical or otherwise, a defendant must be shown to have had actual knowledge of importation contrary to law, as guilt being personal, each defendant must be shown personally to have shared in the guilty intent or knowledge constituting the crime.

Judge Waterman stated in his dissenting opinion at pages 79 and 80 as follows:

> 'Section 174 forbids: (1) knowing illegal importation of narcotics; (2) receipt, concealment, purchase or sale of narcotics known to have been illegally imported; (3) facilitation, in any manner, of the transportation, concealment or sale of narcotics knowing the narcotics to have been illegally imported; and (4) any conspiracy to commit any of the above enumerated acts. At the risk of understatement one may say that this detailed statute is comprehensive! To engraft the general provisions of 18 U.S.C. § 2 onto this statute, so clearly an all-inclusive and self-contained one, would be to increase the duplications that already exist. For example, I doubt that the line between aiding and abetting on the one hand, and conspiracy on the other, has ever been satisfactorily drawn. Compare *Cosgrove* v. *United States*, 9 Cir., 1954, 224 F. 2d 146, 150-155 and Pereira v. United States, 1954, 347 U. S. 1, 11, 74 S. Ct. 358, 98 L. Ed. 435. How much more difficult it will be to draw a distinction between, for instance, aiding and abetting the sale of narcotics, and the facilitation, in any manner, of such a sale. My three colleagues would make such a distinction, for the statutory scheme they envisage would require proof of possession when a defendant is charged with the facilitation of the narcotics traffic but not when he is accused of aiding and abetting this traffic. I cannot join in attributing such eccentricity to Congress.''

Judge Friendly in *Santore* while agreeing on the law with the dissent (page 81) voted to affirm the conviction of the appellants Santore and LoPiccolo on the facts, finding that Santore had actual knowledge of illegal importation while LoPiccolo had actual possession.

In *United States* v. *Hernandez*, on rehearing, 290 F. 2d 86 which involved violations of Title 21 U.S.C. Sec. 174 and wherein a judgment of conviction had been reversed and a new trial ordered (See *United States* v. *Hernandez*, 282 F. 2d 71) the Second Circuit granted rehearing in order to clarify for the new trial, the applicable rule regarding the presumption arising from possession of narcotics in a prosecution under Title 21 U.S.C. Sec. 174 and which rule had recently been stated by said Court in *Santore*.

In *United States* v. *Hernandez*, *supra*, the Second Circuit by a divided Court (Judge Clark writing the majority opinion with which Judge Waterman concurred, Judge Moore dissenting) set forth the various factors that it considered sufficient to bring the statutory presumption arising from possession into play. These factors were enumerated as physical custody by a defendant, physical custody by an agent or employee of the defendant whom said defendant can control, or where the defendant is sufficiently associated with persons having physical custody of the drug so that he is without difficulty able to cause said drug to be produced. Judge Clark then went on to state at page 90 as follows:

> "[8] Possession, actual or constructive, must be shown with respect to each individual conspirator, facilitator, or aider and abettor. Possession by another defendant by itself is not sufficient. See United States v. Santore, supra, 2 Cir., Nov. 16, 1960, 290 F. 2d 51, opinions by Judges Waterman and Friendly. It is true that three of the six members of the Court in the Santore case held the contrary view that possession by a codefendant was sufficient to sustain conviction of an aider and abettor, even though the latter did not have actual or constructive

> possession. But since it was not a majority view, it cannot be taken as the law governing the retrial of this case unless perchance the Supreme Court meanwhile has spoken and so held. Admittedly we cannot foretell the eventual development of the law, but it does not seem amiss to suggest to the trial judge the obvious precaution that he avoid a charge based on legal principles held erroneous by half our appellate bench."

Judge Moore, in his dissenting opinion in *Hernandez*, was of the opinion that the decision of Judge Lumbard in *Santore* in which Judge Moore concurred should be followed. Judge Moore, in his dissenting opinion, stated at page 93 as follows:

> "Presiding upon the retrial and faced with this dilemma, what is the hapless trial judge to do? If he rules or charges a jury in accordance with the opinions of Chief Judge Lumbard and Judge Smith in Santore, Judge Moore concurring, he may have every expectation of believing that he has correctly ruled, provided, however, the appeal is heard by a panel upon which are two of the three Judges who concur in this view. If by chance two of the three having contrary views are sitting, a reversal might be likely. But even here this result would not obtain were Chief Judge Lumbard not disqualified to participate. As in Santore, an in banc court by a three-to-three vote would affirm on the possession presumption point and no contrary instructions would issue. If this seeming impasse is not cured by legislation or Supreme Court resolution of the problem, every narcotics case in this Circuit in which the possession presumption point were involved, if submitted in banc would follow the pattern of Santore. By such means would trial judges be assured that they could

with some degree of assurance and safety follow the principles believed by Judges Lumbard, Smith and Moore to be the law."

In short, instead of clarifying the law, the Second Circuit in *Hernandez* recognized the present state of confusion existing as to the interpretation of the statutory presumption arising out of possession created by Title 21 U.S.C. Sec. 174.

An excellent example of the dilemma referred to by Judge Moore in his dissent in *Hernandez* is the present appeal. The panel deciding the present appeal consisted of Chief Judge Lumbard and Circuit Judges Friendly and Smith with Judge Friendly writing the opinion. Judge Friendly on the present appeal avoided further disagreement on the quantum of proof necessary to bring the statutory presumption into operation by giving the term "possession" an interpretation in its widest sense, similar to that given by him in *Santore* where he found possession in Lo Piccolo and knowledge of illegal importation in *Santore*. However, it is respectfully submitted that in the present case there is no basis for such a finding (See Point I). Likewise the votes of Chief Judge Lumbard and Judge Smith to affirm petitioner's conviction are consistent with their view in *Santore* that possession in any co-conspirator in and of itself was sufficient to bring the statutory presumption into operation as against the petitioner.

It almost reduces itself to a mathematical probability that were Judges Clark and Waterman on the panel deciding the present appeal, that based upon their views as stated in *Santore* and *Hernandez*, that the conviction of the petitioner would have been reversed.

It is respectfully submitted that the questions arising out of the conflicting interpretations of the statutory presumption arising out of possession created by Title 21 U.S.C. Sec. 174 should be finally clarified and settled by the Supreme Court and that the present case presents a proper foundation for the presentation of these questions.

POINT III

The petitioner adequately protected his rights with regard to the incorrect charge given by the Trial Court when he made additional requests to charge which if granted would have corrected the Court's error and due exception was taken to the Trial Court's refusal to so charge. (Question 6)

The Court of Appeals in its opinion of affirmance held that although the Trial Court gave too broad a charge upon the subject of "constructive possession" under the doctrine as laid down by the Second Circuit in *United States* v. *Hernandez, supra*, that as no exception was taken to the charge as such, that this error was not reviewable on appeal. See *United States* v. *Monica*, — F. 2d —, see slip opinion annexed as appendix, pages 39 and 40.

Two of the petitioner's requests to charge, to wit: Request Number Eight and Request Number Twelve, if granted would have covered substantially the law as it later was enunciated by the Court in *United States* v. *Hernandez, supra*, decided on reargument on February 14, 1961.

In request Number Eight, the petitioner asked the Trial Court to charge that before he could be convicted of a violation of Title 21 U.S.C. Sec. 174 that it must be proven

that he had knowledge that the narcotics were imported contrary to law (R. 173, 29a, 30a). In Request Number Twelve, the petitioner asked the Trial Court to charge that if he was merely found to be a messenger for other conspirators and was engaged in one simple isolated transaction only, that such a fact by itself would be an insufficient basis upon which to bottom an inference of participation in a continuous conspiracy (R. 174, 30a). The Trial Court refused to grant this request to charge and exception was duly taken (R. 168, 27a, R. 170, 29a).

It is to be noted that whereas the judgment of conviction of the petitioner in the Trial Court was dated and entered the 16th day of December, 1960, the decision of the Court of Appeals in *United States* v. *Hernandez*, *supra*, was dated approximately two months subsequent to the entry of the judgment of conviction of petitioner, to wit, on February 14, 1961, hence as of the date of the charge in the present case, the law as enunciated in *Hernandez* had not been stated.

In any event it is respectfully submitted that the petitioner had amply protected his rights by requesting additional charges to supplement the charge as given by the Trial Court and by excepting to the Trial Court's refusal to charge as requested.

CONCLUSION

The petition for certiorari should be granted and this Court in the exercise of its power should order the judgment of conviction of the petitioner reversed.

Respectfully submitted,

ALLEN S. STIM
Member of the Bar of the Supreme Court of the United States
Attorney for Petitioner

Of Counsel:
MENAHEM STIM
Member of the Bar of the Supreme Court of the United States

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 8—September Term, 1961.

(Argued September 26, 1961 Decided October 23, 1961.)

Docket No. 26758

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL MONICA,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Appeal from judgment of the District Court for the Eastern District of New York, Walter Bruchhausen, *Chief Judge*, after verdict, convicting appellant of conspiracy to violate the narcotics laws, 21 U.S.C. §174 Affirmed.

ALLEN S. STIM (Menahem Stim and Allen S. Stim on brief), New York, New York, *for Appellant.*

JOSEPH J. MARCHESO (Joseph P. Hoey, United States Attorney, E. D. N. Y., Margaret E. Millus, Assistant U. S. Attorney, on brief), *for Appellee.*

Appendix

FRIENDLY, *Circuit Judge*:

Michael Monica appeals from a judgment of the District Court for the Eastern District of New York, rendered after a verdict convicting him of conspiracy to violate 21 U.S.C. §174, which prohibits among other things the transportation or sale of illegally imported narcotics, and sentencing him to imprisonment for a term of eight years. The conspiracy count of the indictment named nine other defendants; eight of them pleaded guilty and the ninth was found so by another jury. The only points argued, or meriting argument, were the sufficiency of the evidence, both generally and in particular relation to the "possession" which the final sentence of §174 makes "sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury," and the charge.

The Government presented ample evidence, not limited to that summarized below, to show a conspiracy in the spring of 1959, wherein orders for narcotics were accepted by defendant John Freeman at the Palm Florist Shop in Brooklyn; narcotics were ordered by Freeman from defendan Joseph Valachi, a resident of the Bronx; deliveries were made by Valachi or his associates to Freeman or Freeman's associate, defendant Horton; and deliveries to the customer were effected, or attempted, by Horton or other associates of Freeman.

The first issue is whether there was sufficient evidence to link Monica with this conspiracy. The Government's evidence to that end may be summarized as follows:

Appendix

(1) On March 30, some time after a narcotics agent had placed an order for heroin with John Freeman, the latter met Horton in the afternoon at the Palm Florist's in Brooklyn, and again early in the evening at the Esquire Florist Shop, another Freeman enterprise, in Harlem. Late in the afternoon defendant Wagner visited Valachi's residence in the Bronx. In the early evening Wagner met defendant Sperling. Monica saw Valachi for five minutes at the Bronx apartment of a Mrs. Cuccuru, and Wagner, Sperling and Freeman assembled briefly at the Esquire Florist Shop. Sperling then drove off from the shop in a green Oldsmobile for the Bronx, where he parked the car and left it. An hour later Monica paid a half-hour visit to the Cuccuru apartment, returning again at 1:15 A.M. on March 31; Valachi there handed Monica a brown paper package which Monica put inside his shirt pocket. Meanwhile Horton had gone to the Bronx River Bar. Monica then met Wagner and Sperling at another Bronx bar, the Maple, each arriving separately. Sperling left the Maple Bar, went to the green Oldsmobile, placed a package under the seat, and walked past the Bronx River Bar, nodding as he did. Horton emerged, entered the parked Oldsmobile, drove to Brooklyn, and sold a package containing heroin to a special employee of the Narcotics Bureau.

(2) On the evening of April 4, Horton drove a green Oldsmobile to the same location in the Bronx and again entered the Bronx River Bar. A black Ford, with Monica the driver and Wagner a passenger, slowly passed the Oldsmobile, made a U-turn, and passed it again. Monica

and Wagner returned an hour later. Wagner got out of the Ford, opened the Oldsmobile with a key, and placed a brown paper bag on the driver's seat. He walked to the Bronx River Bar and went in; an hour later Horton exited and drove off in the Oldsmobile, only to be apprehended by a New York City detective who found in the car a brown paper bag containing packages of heroin.

(3) In the morning of May 6 a Federal narcotics agent ordered 20 ounces of "cut stuff" from John Freeman who undertook to make delivery on May 7. On the evening of May 6, shortly after Freeman had reconfirmed the deal, an agent heard Valachi and Monica outside a theater in the Bronx in a conversation described as follows:

> "Vallacci [sic] said, 'John's customer in Brooklyn is taking a half' and the defendant Michael Monica said, 'A half' he said 'All right' and Vallacci said, 'Get a half and a quarter, too' and the defendant said, 'A half and a quarter—okay,' and Vallacci said to Monica, 'Be careful' and that was it."

Monica left in a black Ford. The following evening lieutenants of Freeman made a delivery of 120 envelopes, containing 121 ounces of heroin, to the narcotics agent.

Whether the test of sufficiency of the evidence for the jury in a criminal prosecution be properly phrased as simply that "the evidence would have been enough in a civil action," *United States* v. *Costello*, 221 F. 2d 668, 671 (2 Cir. 1955), aff'd, 350 U. S. 359 (1956), and cases there cited, or, as reasoned by Judge Hutcheson in *Cuthbert* v. *United States*, 278 F. 2d 220, 224 (5 Cir. 1960), that the evidence must be "substantial enough to establish a case

from which the jury may infer guilt beyond a reasonable doubt," see *United States* v. *Lefkowitz*, 284 F. 2d 310, 315 (2 Cir. 1960), the evidence here met it. Each of the three episodes gained color from each of the others. Thus, even though we assume *arguendo* that the March 30-31 episode might not alone have furnished a sufficient basis for inferring beyond reasonable doubt that the package which Valachi handed Monica was the same package which, after a sojourn in the parked green Oldsmobile, was delivered to the special employee in Brooklyn, there being no such particularized evidence of identity as was offered in *United States* v. *Montalvo*, 271 F. 2d 922 (2 Cir. 1959), the incident surely did establish such a basis when coupled with the similar episode on April 4-5 and the Monica-Valachi conversation on May 6. By the same token, any contention that Monica was an innocent chauffeur for Wagner on April 4-5 loses almost all its underpinning when the events of that evening are linked with the evidence tending to show Monica's participation in the earlier and later deliveries. Similarly, whatever force there might otherwise be in the argument that "A half and a quarter," as to which Valachi adjured Monica to "Be careful" on May 6, might have been candy or kerosene, to be delivered to one of the countless other Johns in Brooklyn—and that would hardly be much[1]—is altogether eliminated when this episode is

[1] Appellant argues that even if the jury could properly infer that "a half" meant a half a kilogram, the unit of weight common in the narcotics trade, there was no correlation between that weight and the 20 ounces ordered by the narcotics agent. A half kilogram weighs approximately 1.1 lb. or slightly less than 18 avoirdupois ounces, so the discrepancy on that basis would not be very great; however, appellant says drugs are measured in apothecaries'

linked with its two predecessors. Conceivably Monica's connection with a single incident might have been without guilt or causality; it would demand more credulity than the law requires to suppose he was an unfortunate victim of coincidence on three occasions in a span of thirty-eight days. And if the evidence in the aggregate warranted a finding of guilt beyond a reasonable doubt as to any one incident, it did as to all three.

For my brothers the issue as to the sufficiency of evidence of possession is easy. Under the views expressed by them and Judge Moore in *United States* v. *Santore*, 290 F. 2d 51 (2 Cir. 1959), on rehearing *in banc*, 290 F. 2d at 74 (2 Cir. 1960), it would be enough that any member of the conspiracy was proved to have had possession, and the evidence on that score was ample. For me the question presents more problems. In *Santore*, I joined with Judges Clark and Waterman in the view that, in the absence of proof of knowledge of importation, conviction of an aider and abettor under 21 U.S.C. § 174 was not sustainable without proof of possession on his part. In *United States* v. *Hernandez*, 290 F. 2d 86, 90 (2 Cir. 1961), the majority applied this view to a conspirator—a conclusion I should

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ounces of which there are only 12 in a pound. The Government answers that the order was for "cut stuff," so that a half kilo of pure heroin could well make 20 apothecaries' ounces of "cut stuff." Granted that all this is debatable, the evidence warranted the jury in finding it scarcely coincidental that on the same day when John Freeman had accepted a narcotics order, Valachi, who could well have been found to have been Freeman's source in the similar transaction of March 30-31, commissioned Monica to obtain for "John's customer in Brooklyn" a "half" of something as to which Monica must "be careful," and that narcotics were delivered to "John's customer" the next day.

have thought arguable but not inevitable. Assuming that proof of possession on appellant's part was here required, I find the evidence sufficient. Like any other element in the prosecution's case, possession need not be proved by direct evidence but may be established by proof permitting an inference to be drawn beyond reasonable doubt. As heretofore stated, the evidence warranted a finding of participation by Monica on each of the three occasions. On that basis, there was enough to justify the jury in finding possession in the physical sense on March 30-31, and also on May 6-7, see footnote 1; hence it is unnecessary to debate whether the evidence was also sufficient to find possession on April 4-5 on principles akin to those applied in *United States* v. *Santore, supra*, at 75-78, 81 with respect to defendant LoPiccolo, *United States* v. *Buonanno*, 290 F. 2d 585 (2 Cir. 1961), and *Cellino* v. *United States*, 276 F. 2d 941 (9 Cir. 1960), and relied on as an alternate ground in *United States* v. *Cox*, 277 F. 2d 302, 303 (2 Cir. 1960).

The judge charged that under 21 U.S.C. § 174 "possession of narcotics by an accused need not be physical possession. Such possession may be constructive possession, i.e., by an individual over which the accused has dominion or control, or possession by co-conspirators or agents, if any, of the accused." Under the view expressed by my brothers in *Santore* this was entirely correct; on the other hand, if the view in which I there joined is properly applicable to a conspirator, as held in *Hernandez*, the last portion of the quotation would have been too broad. However, no exception was taken to it, and I see

no reason to invoke the plain error rule, F. R. Crim Proc. 52(b).

There was no error in the refusals to charge or in any of the other rulings assailed in appellant's brief.

Affirmed.